United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-1783

Union Pacific Railroad Company; Missouri Pacific Railroad Company; Union Pacific Corporation; Missouri-Kansas-Texas System Pension Plan For Non-Agreement Employees, by Ursula Fairbairn, Barbara Schaefer, and James Young, in their capacity as the pension committee,	*	
Appellants,	*	
v.	*	
Bryan L. Beckham; Gary K. Bradshaw; William E. Dixon; Mike L. Eudy; Marshall W. Hales; Billy Joe Harmon; James M. Hentschel; Carl W. Holem; James D. Miller; Cecil Rhodes, Jr.; Paul J. Richter; Daniel A. Witte,	*	Appeal and Cross-Appeal from the United States District Court for the District of Nebraska
Appellees,	*	
Wyatt Company, The; Towers Perrin,	*	
Interested Parties,	*	

Pension Plan For Salaried Employees of Union Pacific Corporation and Affiliates, *

Defendant, *

Secretary of Labor, *

Amicus Curiae, *

Bryan L. Beckham; Gary K. Bradshaw; William E. Dixon; Mike L. Eudy; Marshall W. Hales; Billy Joe Harmon; James M. Hentschel; Carl W. Holem; James D. Miller; Cecil Rhodes, Jr.; Paul J. Richter; Daniel A. Witte, *

Appellees, *

Union Pacific Corporation; Missouri-Kansas-Texas System Pension Plan For Non-Agreement Employees; Pension Committee of the MKT Plan; Named Fiduciary-Plan Administration of the UP Plan (The "UP Plan Administrator"), *

Appellants. *

No. 97-1783

Union Pacific Railroad Company; *
Missouri Pacific Railroad Company; *

Union Pacific Corporation; Missouri-Kansas-Texas System Pension Plan For Non-Agreement Employees, by Ursula Fairbairn, Barbara Schaefer, and James Young, in their capacity as the pension committee,

Appellees,

Bryan L. Beckham; Gary K. Bradshaw; William E. Dixon; Mike L. Eudy; Marshall W. Hales; Billy Joe Harmon; James M. Hentschel; Carl W. Holem; James D. Miller; Cecil Rhodes, Jr.; Paul J. Richter; Daniel A. Witte,

Appellants,

Wyatt Company, The; Towers Perrin,

Interested Parties,

Pension Plan For Salaried Employees of Union Pacific Corporation and Affiliates, for Salaried Employees of Union Pacific Corporation and Affiliates,

Defendant,

Secretary of Labor,

Amicus Curiae,

Bryan L. Beckham; Gary K. Bradshaw; William E. Dixon; Mike L. Eudy; Marshall W. Hales; Billy Joe Harmon; James M. Hentschel; Carl W. Holem; James D. Miller; Cecil Rhodes, Jr.; Paul J. Richter; Daniel A. Witte,	*
Appellants,	*
Union Pacific Corporation; Missouri-Kansas-Texas System Pension Plan For Non-Agreement Employees; Pension Committee of the MKT Plan; Named Fiduciary-Plan Administration of the UP Plan (The "UP Plan Administrator"),	*
Appellees.	*

Submitted: December 8, 1997
Filed: February 26, 1998

Before McMILLAN, MAGILL, and MURPHY, Circuit Judges.

MAGILL, Circuit Judge.

Employers and their employees have brought this interlocutory appeal and cross-appeal of the district court's grant of partial summary judgment on claims and cross-claims for declaratory relief regarding the employers' interpretations of their ERISA pension plans. The district court held that the employees' cross-claim challenges, filed in 1994, to the

employers' 1988 interpretations of their plans were time-barred, but that the cross-claim challenge to a 1992 amendment to one of the employer's plans, which relied on the 1988 interpretation of its plan, was not time-barred. Because we find that all of the cross-claims in this matter are time-barred, we affirm in part and reverse in part.

I.

Prior to 1988, the Missouri-Kansas-Texas Railroad Company (MKT) maintained a pension plan (the MKT Plan) for its employees. The MKT Plan provided for the payment of benefits to eligible MKT employees in accordance with the amount of "Credited Service" they accrued while employed by MKT. Under the MKT Plan, an eligible employee accrued "Credited Service" in accordance with the number of hours that the employee worked with MKT during a plan year.

In 1986, the Missouri Pacific Railroad Company (MPRR), a subsidiary of Union Pacific Company (UP), negotiated to acquire substantially all shares of stock in MKT. The Interstate Commerce Commission (ICC) approved the acquisition in May 1988, and on August 12, 1988, MPRR acquired substantially all shares of stock in MKT and assumed direct control over MKT's assets. Prior to the acquisition, UP maintained a pension plan (the UP Plan) for its employees which, like the MKT Plan, provided for the payment of benefits to eligible employees in accordance with the amount of "Credited Service" they accrued while employed by UP. Under the UP Plan, an employee accrued "Credited Service" in accordance with the number of hours that the employee worked with UP during a plan year.

After the ICC approved the acquisition, but before MPRR's direct control, MKT and UP provided the MKT

employees with the option either to accept a voluntary severance package from MKT and terminate their employment prior to the acquisition date or to become employed, as of the acquisition date, by UP. UP explained in explicit terms to the MKT employees that if they opted to become UP employees, then they would cease to accumulate "Credited Service" under the MKT Plan as of the acquisition date. UP also clearly explained that once the MKT employees commenced working for UP, they would begin accumulating "Credited Service" under the UP Plan but would not receive any "Credited Service" under the UP Plan for their pre-acquisition MKT service.

To specifically demonstrate the effects of the acquisition on the MKT employees' pension benefits under the MKT Plan and the UP Plan, UP distributed "fact sheets" to the MKT employees and held three open meetings where the employees were permitted to ask questions about the effect of the acquisition on the various plan benefits. Each fact sheet asserted that prior MKT service would not be used to determine a former MKT employee's accrual of "Credited Service" under the UP Plan. In addition, each fact sheet provided an example illustrating that post-acquisition UP service would not be used to determine an employee's accrual of "Credited Service" under the MKT Plan.

Rather than accepting the severance offer, several former MKT employees, including Bryan L. Beckham, Gary K. Bradshaw, William E. Dixon, Mike L. Eudy, Marshall W. Hales, Billy Joe Harmon, James M. Hentschel, Carl W. Holem, James D. Miller, Cecil Rhodes, Jr., Paul J. Richter, and Daniel A. Witte (collectively, the claimants), ceased employment with MKT and accepted employment with UP. The claimants concede that they received the UP fact sheets

and that, as of August 1988, they were aware that "after the UP/MKT merger, [they] would cease earning Credited Service under the MKT Plan, and that [they] would not receive Credited Service under the UP Plan for [their] MKT employment." Witte Aff. ¶ 3, reprinted in III J.A. at 84950.

On September 24, 1992, the UP Plan was amended to offer a voluntary early retirement incentive program (VERIP) to UP employees who had acquired at least four years of continuous "Credited Service" with UP as of December 31, 1992. Consistent with its benefits accrual policy adopted and explained to the claimants in 1988, UP refused to consider former MKT employees' pre-acquisition service with MKT when determining their eligibility for the VERIP. The VERIP expired in December 1992.

In 1993, the claimants sought legal advice concerning UP's refusal to count pre-acquisition MKT service as "Credited Service" under the UP Plan and post-acquisition UP service as "Credited Service" under the MKT Plan. Prior to this time, the claimants assumed either that UP's determinations concerning "Credited Service" were proper interpretations of the plans or that UP intended to change the plans to bring about this result. See id. ¶ 4, reprinted in III J.A. at 850. In March 1994, however, the claimants wrote a letter to UP threatening litigation concerning the refusal to consider post-acquisition UP service when calculating benefits under the MKT Plan. UP referred the letter to the Pension Committee of the MKT Plan (MKT Plan Committee), which deemed the claimants' letter to be a request for benefits. On March 31, 1994, the MKT Plan Committee denied the claimants' request for benefits, asserting that UP service did not count as "Credited Service" under the MKT Plan.

On April 1, 1994, UP, Union Pacific Railroad Company, MPRR, and the MKT Plan filed a class action complaint for declaratory judgment under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, against the claimants. In their complaint, plaintiffs sought a determination that their construction of the MKT Plan and their refusal to count post-acquisition UP employment as "Credited Service" under the MKT Plan was neither arbitrary, capricious, nor an abuse of discretion. The claimants counterclaimed pursuant to 29 U.S.C. § 1132(a)(1)(B) and (3), naming UP, the MKT Plan, the MKT Plan Committee, the UP Plan, and the UP Plan Administrator as counterclaim defendants (collectively, the UP Parties). In their counterclaim, the claimants sought remedies under ERISA relating to the UP Parties' construction and implementation of the UP Plan, the MKT Plan, and the VERIP. After amending their counterclaim, the claimants alleged four causes of action (counts I-IV) against the UP Parties relating to their refusal to count post-acquisition UP service as "Credited Service" under the MKT Plan, one cause of action (count V) against the UP Parties relating to their refusal to count pre-acquisition MKT service as "Credited Service" under the UP Plan, and one cause of action (count VI) against the UP Parties relating to their refusal to count pre-acquisition MKT service as "Credited Service" when determining eligibility for the VERIP.[11]

The UP Parties moved to dismiss or stay the counterclaims because the claimants had failed to exhaust

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[11] The amended counterclaim also included a seventh count relating to UP's alleged failure to comply with various ERISA disclosure requirements. However, that count was not certified as a class claim and was not a subject of the underlying motions for summary judgment and, thus, is not before this Court on appeal.

available administrative remedies under the UP Plan and the MKT Plan. The UP Parties argued that the claimants never appealed the MKT Plan Committee's denial of benefits and that the claimants never attempted to seek benefits under the UP Plan or the VERIP before filing their counterclaim. The claimants contended that exhaustion of administrative remedies would be futile and inappropriate because their claims were asserted as compulsory counterclaims to the UP Parties' Complaint. The district court agreed that requiring the claimants to exhaust their administrative remedies was futile because "[t]here is no indication that the position taken by the [UP Parties] since 1988 and in their complaint would be subject to change if the [claimants] initiated or participated in an optional administrative review process. "Mem. and Order at 5 (D.Neb. June 2, 1995), reprinted in Appellants' Add. at 5.

The UP Parties subsequently filed a motion for summary judgment on the grounds that the claimants failed to state claims upon which relief could be granted and, alternatively, that their claims were time-barred. The district court dismissed counterclaim counts II and V (breach of fiduciary duty claims) for failure to state a claim. The district court also dismissed counterclaim counts I, III, IV, and V as time-barred by the applicable Nebraska statute of limitations. The district court refused, however, to dismiss counterclaim count VI (relating to the VERIP).

The UP Parties, after conducting a sue sponte administrative appeal of the claimants' claims,[12] also submitted

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[12] The UP Parties conducted the review on their own initiative and "invited" the claimants to submit documents for consideration. Only a few of the claimants accepted this offer, however, because the district court had already ruled that requiring the claimants to exhaust the administrative

a motion for summary judgment on the merits, arguing that the district court must review the UP Parties' "Credited Service" interpretation under an abuse of discretion standard. The district court denied the motion, reasoning that deferential review was inappropriate here, where exhaustion was not required.

The district court, in accordance with 28 U.S.C. § 1292(b), certified each of its orders for appeal. The UP Parties appeal the district court's refusal to dismiss counterclaim count VI, the district court's refusal to require the claimants to exhaust their administrative remedies, and the district court's refusal to review their final administrative decision under a deferential standard. The claimants appeal the district court's dismissal of counterclaim counts I, III, IV, and V as time-barred.[13]

II.

We review the district court's grant of summary judgment de novo, applying the same standards as the district court. See Mayard v. Hopwood, 105 F.3d 1226, 1227 (8th Cir. 1997). Summary judgment is appropriate only if, after viewing the facts and the inferences to be drawn from them in the light most favorable to the nonmoving party, the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See

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procedure would be futile.

[13] None of the parties' briefs address the district court's dismissal of counterclaim counts II and V for failure to state a claim. Accordingly, we will not address the district court's dismissal of these counts on this ground.

Fed. R. Civ. P. 56(c); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

After reviewing the record, we find that each of the claimants' claims is time-barred. Because ERISA does not contain a statute of limitations for actions seeking to recover plan benefits or to clarify rights to future plan benefits under § 1132(a)(1)(B), or for actions alleging violations of 29 U.S.C. § 1054(g) and (h), this Court looks to state law for the most analogous statute of limitations. See Adamson v. Armco, Inc., 44 F.3d 650, 652 (8th Cir. 1995). In this case, the parties agree that the most analogous state statute of limitations for counterclaim counts I, III, IV, V, and VI is Nebraska's five-year statute of limitations for actions on written contracts. See Neb. Rev. Stat. Ann. 25-205(1) (Michie 1995); Johnson v. State Mut. Life Assurance Co. of Am., 942 F.2d 1260, 1263 (8th Cir. 1991) (en banc) (suit brought under § 1132(a)(1)(B) "should be characterized as a contract action for statute of limitations purposes").

When analyzing the effects of statutes of limitations, the Supreme Court has stated that "the length of the [limitations] period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-64 (1975). Important policies, such as rapid resolution of disputes, repose for those against whom a claim could be brought, and avoidance of litigation involving lost evidence or distorted testimony of witnesses, underlie statutes of limitations. See Wilson v. Garcia, 471 U.S. 261, 271 (1985). Accordingly, statutes of limitations "for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular

litigants," Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1984) (per curiam), and strict adherence to such limitations periods "is the best guarantee of evenhanded administration of the law." Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980).

In this case, and despite determining the limitations period by analyzing state law, this Court looks to federal common law to determine the time at which a plaintiff's federal claim accrues. See Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990); see also Connors v. Hallmark & Son Coal Co., 935 F.2d 336, 341 (D.C. Cir. 1991) (citing cases). In a federal question case, and in the absence of a contrary directive from Congress, the "discovery rule," according to which a plaintiff's cause of action accrues when he discovers, or with due diligence should have discovered, the injury that is the basis of the litigation, is used to determine when a plaintiffs federal claim accrues. See Alcom v. Burlington N.R.R., 878 F.2d 1105, 1108 (8th Cir. 1989) (cause of action accrues "when a claimant knows, or should know through an exercise of reasonable diligence, of the acts constituting the alleged violation"); see also Connors, 935 F.2d at 342 (citing eight circuits holding that "the discovery rule is the general accrual rule in federal courts . . . [and] is to be applied in all federal question cases"); Cada, 920 F.2d at 450 (holding that the discovery rule is "read into statutes of limitations in federal question cases (even when those statutes of limitations are borrowed from state law)").

Consistent with the discovery rule, the general rule in an ERISA action is that a cause of action accrues after a claim for benefits has been made and has been formally denied. See Cotter v. Eastern Conf. of Teamsters Retirement Plan, 898 F.2d 424, 428-29 (4th Cir. 1990). Thus, a beneficiary cannot

successfully argue that he was unaware of an injury after a claim for benefits has been formally denied. Nonetheless, and still consistent with the discovery rule, an ERISA beneficiary's cause of action accrues before a formal denial, and even before a claim for benefits is filed, "when there has been a repudiation by the fiduciary which is clear and made known to the beneficiar[y]." Miles v. New York State Teamsters Conf. Pension & Retirement Fund Employee Pension Benefit Plan, 698 F.2d 593, 598 (2d Cir. 1983) (quotations and citations omitted); see also Daill v. Sheet Metal Workers' Local 73 Pension Fund, 100 F.3d 62, 66 (7th Cir. 1996) ("a cause of action accrues upon a clear and unequivocal repudiation of rights under the pension plan which has been made known to the beneficiary," even if such repudiation occurs prior to the beneficiary's submission of a formal claim); Schroeder v. Phillips Petroleum Co., 970 F.2d 419, 420 (8th Cir. 1992) (per curiam) (agreeing with district court that cause of action accrued in 1986, when beneficiaries were clearly aware that they would not receive benefits, despite fact that beneficiaries had not yet filed applications for benefits); Martin v. Construction Laborer's Pension Trust, 947 F.2d 1381, 1385 (9th Cir. 1991) (cause of action accrues upon a "clear and continuing repudiation of [the beneficiary's] claim"); Cotter, 898 F.2d at 429 (absent a formal claim and a formal denial of the claim, a beneficiary's cause of action accrues at "the time at which some event other than a denial of a claim should have alerted [the beneficiary] to his entitlement to the benefits he did not receive").

In this case, the claimants were unequivocally informed by August 12, 1988, that their pre-acquisition MKT service would not be used to determine "Credited Service" under the UP Plan and that their post-acquisition UP service would not be

used to determine "Credited Service" under the MKT Plan. The claimants have averred that

> [s]ince 1986 . . . [the claimants] repeatedly have been informed by numerous individuals, including employee benefit department employees and the Chairman and Chief Executive Officer of the Union Pacific Railroad, that they would not receive any benefit credit under the UP Plan for their MKT service. At no time has any corporate or UP Plan official indicated that this position would be changed, or even that it was under review.

Mem. of Law in Opp'n to Mot. to Dismiss or to Stay Defs.' Am. Countercl., Apr. 14, 1995 at 15-16 (footnote omitted). One of the claimants submitted an affidavit to the district court, asserting that

> [i]n or about August 1988, various corporate representatives of the Union Pacific Railroad informed me and other class members that after the UP/MKT merger, we would cease earning Credited Service under the MKT Plan, and that we would not receive Credited Service under the UP Plan for our MKT employment.

Witte Aff. 113, reprinted in III J.A. at 849-50. Witte also asserted that at that time, "we thought we were being treated unfairly." Id. ¶ 4, reprinted in III J.A. at 850.

Prior to the August 1988 acquisition, UP held several open meetings and distributed literature to explain to MKT employees that pre-acquisition MKT service would not be used

to determine "Credited Service" under the UP Plan and that post-acquisition UP service would not be used to determine "Credited Service" under the MKT Plan. The fact sheets distributed by UP stated that "UP service after the merger date will be used for the accrual of pension benefits only under the UP Plan." Fact Sheet C, Question 11 and Answer, reprinted in Appellants' Add. at 74. The fact sheets also announced that "[p]rior [MKT] service will not be used to determine accrual under the UP Plan for pension benefits." Id., Question 9 and Answer, reprinted in Appellants' Add. at 73. The fact sheets also provided the following example to demonstrate how MKT service and UP service would be allocated when determining pension benefits under the different pension plans at retirement:

> Employee "C" has six years creditable service with MKT, joins UP and works four years before deciding to retire... [Upon retiring,] Employee "C" will receive a pension benefit calculated on six years of service under the MKT pension plan and four years under the UP pension plan.

Id.

As of August 1988, the UP Parties had clearly and unequivocally informed the claimants that their pre-acquisition MKT service would not count as "Credited Service" under the UP Plan and that their post-acquisition UP service would not count as "Credited Service" under the MKT Plan. The claimants, at that time, believed that this allocation scheme was "unfair" and improper, and could have filed a cause of action challenging the UP Parties' interpretation of "Credited Service" under either of the plans. Accordingly, we hold that the claimants' causes of action, as alleged in amended counterclaim

counts I, III, IV, and V, accrued in August 1988.[14] Because the claimants did not file their counterclaim until 1994, these counts are time-barred under the applicable five-year statute of limitations.

The claimants argue that even if counterclaim counts I, III, IV, and V are time-barred, counterclaim count VI cannot be time-barred because the VERIP was not offered until 1992. We disagree.

To prevail under counterclaim count VI, the claimants must establish that the UP Parties' interpretation of "Credited Service" under the UP Plan when determining eligibility for the VERIP is incorrect. See First Am. Answer and Countercl., Count VI, at 21-22, reprinted in I J.A. at 100-01.[15] The UP

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[14] The claimants' argument that exhaustion of remedies would be futile in this case supports this conclusion. When exhaustion is futile, an ERISA beneficiary's claim "accrue[s] at the time at which it became futile to apply for benefits, because . . . at that time there was a de facto denial of [the beneficiary's] claim." Barnett v. International Bus. Machs. Corp., 885 F. Supp. 581, 591 (S.D.N.Y. 1995); see also Schroeder v. Phillips Petroleum Co., 970 F.2d 419, 420 (8th Cir. 1992) (agreeing with district court that cause of action accrued in 1986 when facts demonstrated futility since 1986). The claimants argue that requiring them to exhaust their administrative remedies has been futile since August 1988, after the UP Parties had specifically informed them that they would not receive any "Credited Service" under the UP Plan for pre-acquisition MKT service and that they would not receive any "Credited Service" under the MKT Plan for post-acquisition UP service. Taking these allegations as true, the claimants' causes of action, as alleged in counterclaim counts I, III, IV, and V, accrued no later than August 1988--over five years before they filed their counterclaim.

[15] Count VI, in relevant part, provides:

71. Because UPC [Union Pacific Corporation] and the

Parties' interpretation of"Credited Service" under the UP Plan when determining VERIP eligibility, however, is the same as their interpretation of "Credited Service" under the UP Plan when determining benefits, which is the basis of counterclaim count V. As we have held, the claimants are time-barred from challenging this long-standing interpretation.

"Where a complaint based upon an earlier event is time-barred, to permit the event itself to cloak with illegality that which was otherwise lawful in effect results in reviving a legally defunct" claim. Lorance v. AT&T Techs., Inc., 490 U.S. 900, 911 (1988) (alterations, quotations, and citation omitted).[16] The claimants' attempt to utilize the VERIP to challenge the UP Parties' interpretation of "Credited Service" under the UP Plan is nothing more than an attempt to revive their time-barred claim concerning this interpretation. Because the claimants cannot successfully challenge the interpretation

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> Plan Administrator erroneously determined that Counterclaim Plaintiffs were not entitled to any Credited Service under the UP Plan for their Credited Service under the MKT Plan, UPC refused to allow Counterclaim Plaintiffs to participate in the VERIP. The VERIP subsequently expired.
>
> 72. UPC and the Plan Administrator have denied Counterclaim Plaintiffs a UP Plan benefit to which they are entitled, i.e., early retirement with an enhanced pension ....

First Am. Answer and Countercl. at 22, ¶¶ 71-72.

[16] Noting that Lorance's specific holding has been abrogated by statute--42 U.S.C. § 2000e-5(e)(2)--the Seventh Circuit recently held that Lorance's "reasoning remains persuasive outside of the Title VII/intentionally discriminatory seniority system context." Huels v. Exxon Coal USA, Inc., 121 F.3d 1047, 1050 n.1 (7th Cir. 1997) (citation omitted).

of "Credited Service" under the UP Plan, the claimants' challenge to the UP Parties' eligibility determination under the VERIP in counterclaim count VI must fail as a matter of law. See Wilson v. International Bus. Machs. Corp., 62 F.3d 237, 240 (8th Cir. 1995) (defendant entitled to summary judgment if plaintiff cannot establish a factual dispute on an element of its cause of action (citing Bialas v. Greyhound Lines, Inc., 59 F.3d 759, 762 (8th Cir. 1995))). Accordingly, the district court erred in failing to grant summary judgment to the UP Parties on this count.

III.

For the foregoing reasons, we affirm the district court order dismissing counterclaim counts I, III, IV, and V as time-barred, we reverse the district court order refusing to dismiss counterclaim count VI, and we remand for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNION PACIFIC CORPORATION, et al.,	)	
Plaintiffs,	)	
vs.	)	
BRYAN L. BECKHAM, et al.,	)	
Individually and on Behalf of All Class Members,	)	8:CV94-189
Defendants and Counterclaim Plaintiffs,	)	MEMORANDUM AND ORDER
vs.	)	
PENSION PLAN FOR SALARIED EMPLOYEES OF UNION PACIFIC CORPORATION, et al.,	)	
Counterclaim Defendants	)	

Before the court are the following: (1) filing no. 34, the "Motion to Dismiss or to Stay Defendants' Amended Counterclaim" (the "motion to dismiss") filed by the plaintiffs, Union Pacific Corporation ("UPC"), Union Pacific Railroad Company ("UPRR"), Missouri Pacific Railroad Company

("MPRR"), the Missouri-Kansas-Texas System Pension Plan for Non-Agreement Employees ("MKT Plan") by Ursula Fairbairn, Barbara Schaefer and James Young ("MKT Plan Committee"); and counterclaim defendants, the Pension Plan for Salaried Employees of Union Pacific Corporation ("UP Plan") and the Named Fiduciary-Plan Administrator of the UP Plan ("UP Plan Administrator"); (2) filing no. 36, the "Motion for Leave to File A Reply in Support of Motion to Dismiss or to Stay Defendants' Amended Counterclaim" filed by the plaintiffs and counterclaim defendants; and (3) filing no. 37, the "Stipulation and Proposed Order," approved by Magistrate Judge Thomas D. Thalken, in which all parties have agreed to stay discovery until the court decides the motion to dismiss (filing no. 34).

On April 1, 1994, the plaintiffs, UPC, UPRR, MPRR and the MKT Plan by the MKT Plan Committee, filed their "Class Action Complaint for Declaratory Judgment" (filing no. 1) against the defendants and counterclaim plaintiffs, Bryan L. Beckham, Gary K. Bradshaw, William E. Dixon, Mike L. Eudy, Marshall W. Hales, Billy Joe Harmon, James M. Hentschel, Carl W. Holem, James D. Miller, Cecil Rhodes, Jr., Paul J. Richter and Daniel Witte ("Beckham et al."). Beckham et al. represent a class of more than 200 former employees (the "defendant-class") of the MKT Railroad and subsidiaries (together "MKT"). In August 1988, UPC acquired MKT by merger of MKT into MPRR, a subsidiary of UPC, at which time the defendant class became employed by UPRR.

The defendant-class members are participants in the MKT Plan by virtue of their former employment with MKT and became participants in the UP Plan after the merger of MKT into MPRR. However, the defendant-class members were notified that they would receive no "Credited Service" under

the UP Plan for the period of their prior service with MKT and their participation in the MKT Plan. Moreover, after the merger in August 1988, although they would remain participants in the MKT Plan, the defendant-class members would not accrue further "Credited Service" under the MKT Plan, because their service for UPRR would not count as "Credited Service" under the MKT Plan.

In their "First Amended Answer and Counterclaim" (filing no. 17), the defendant-class protests that the policy of denying the defendant-class members "Credited Service" under the UP Plan for their prior service with MKT, or "Credited Service" under the MKT Plan for their subsequent service with UPRR, will result in a substantial loss of retirement benefits. In their brief opposing the motion to dismiss, Beckham and the other defendants-counterclaimants explain that a long period of "Credited Service" with either plan yields much more in pension benefits than the benefits which accrue when a participant's service is divided between the two plans. Beckham and the other defendants-counterclaimants estimate that the aggregate monetary effect of the methods used to credit service under the two plans will exceed $10 million lost to the defendant-class.

The "Class Action Complaint for Declaratory Relief" (filing no. 1) seeks a declaration that the methods used to credit service for the defendant-class members under the MKT Plan and the UP Plan are not prohibited by the Employee Retirement Income Security Act of 1974 ("ERISA"). The "First Amended Answer and Counterclaim" (filing no. 17), on the other hand, seeks a declaration that the service calculations at issue and certain related actions do violate ERISA.

In their "Motion to Dismiss or to Stay Defendants' Amended Counterclaim" (filing no. 34), the plaintiffs and counterclaim defendants contend that Counts I, II, V and VI of the Amended Counterclaim should be dismissed without prejudice, or stayed, for failure to exhaust plan remedies. The motion to dismiss also requests that Counts III and IV of the Amended Counterclaim be dismissed with prejudice for failure to state a claim upon which relief may be granted.

The court first finds and concludes that filing no. 36, the "Motion for Leave to File A Reply in Support of Motion to Dismiss or to Stay Defendants' Amended Counterclaim" filed by the plaintiffs and counterclaim defendants shall be, and hereby is granted. Therefore, the brief entitled "Reply in Support of Motion to Dismiss or to Stay Defendants' Amended Counterclaim," received by the court on April 28, 1995, is deemed submitted instanter.

Second, the court finds and concludes that Counts III and IV of the Amended Counterclaim (filing no. 17) should not be dismissed. A claim should be "liberally construed in the light most favorable to the [claimant]" and should not be dismissed "unless it appears beyond a doubt that the [claimant] can prove no set of facts which would entitle the [claimant] to relief." Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994) (citations omitted).

Regarding the issue of exhaustion, the court disagrees with the assertion by the plaintiffs and counterclaim defendants that Counts I, II, V and VI of the Amended Counterclaim should be dismissed or stayed for failure to exhaust remedies under the plan. Therefore, filing no. 34, the "Motion to Dismiss or to Stay Defendants' Amended Counterclaim" shall be, and hereby is, denied.

Counts I and II of the Amended Counterclaim (filing no. 17) seek relief on behalf of the defendant-class for wrongfully denied "Credited Service" under the MKT Plan and for breach of fiduciary duties. Count V alleges wrongful deprivation of "Credited Service" under the UP Plan. Count VI contends that the deprivation of proper "Credited Service" under the UP Plan led to the exclusion of the defendant-class from an early retirement offer ("VERIP") extended by UPRR in 1992 to employees with sufficient "Credited Service."

In Conley v. Pitney Bowes, 34 F.3d 714, 716 (8th Cir. 1994), the Eighth Circuit clearly stated that:

> ERISA does not explicitly require exhaustion of administrative or plan remedies. The doctrine is, in this context, a creature either of contract or judicial invention. **We have required exhaustion in ERISA cases only when it was required by the particular plan involved . . . We have declined to apply a broader, judicially-crafted exhaustion requirement in ERISA actions.**

(Emphasis added.) As Beckham and the other defendants-counterclaimants assert, and plaintiffs do not deny, no provision of either the MKT Plan or the UP Plan contains a requirement for exhaustion of remedies under the plan. Furthermore, the efforts of plaintiffs and counterclaim defendants to distinguish Conley v. Pitney Bowes from this case are not persuasive.

In addition, Beckham and the other defendants-counterclaimants did not commence this action, thereby bypassing available plan remedies. Instead, they were sued by

the plaintiffs who sought a declaratory judgment that the methods of crediting service under the MKT Plan do not violate ERISA. Beckham and the other defendants-counterclaimants subsequently asserted a compulsory counterclaim pursuant to Fed. R. Civ. P. 13(a), alleging that the methods of crediting service under the MKT Plan and the UP Plan deprive the defendant-class of rights protected by ERISA. There is no indication that the position taken by the plaintiffs since 1988 and in their complaint would be subject to change if the defendants and counterclaim plaintiffs initiated or participated in an optional administrative review process.

Thus, it appears from the record and the parties' arguments that the exhaustion of remedies proposed by the plaintiffs and counterclaim defendants not only is not required by the plans, but would constitute a time-consuming, costly and futile endeavor. The court declines to impose an optional administrative process which is resisted by the defendant-class and which would add unnecessary delay and expense to this litigation.

Finally, the court has been notified that the Pension Committee of the MKT Plan and the UP Plan Administrator have initiated an internal review process of their own, apparently to evaluate the merits of the claims asserted in Counts I, II, V and VI of the Amended Counterclaim. If the internal review conducted by those parties results in a reversal of position regarding any contested matter, the issues thereby resolved can be removed from this action.

Meanwhile, the parties shall comply with the disclosure and discovery procedures required by the Federal Rules of Civil Procedure. Therefore, filing no. 37, the "Stipulation and Proposed Order" in which all parties have agreed to stay

discovery until the court decides the motion to dismiss has been rendered moot by this "Memorandum and Order" denying the motion to dismiss. Magistrate Judge Thomas D. Thalken will enter an "Order Setting Schedule for Progression of Case" as appropriate.

THEREFORE, IT IS ORDERED:

(1) That filing no. 34, the "Motion to Dismiss or to Stay Defendants' Amended Counterclaim" filed by the plaintiffs and the counterclaim defendants, UPC, UPRR, MPRR, the MKT Plan by the MKT Plan Committee, the UP Plan Administrator, is denied;

(2) That filing no. 36, the Motion for Leave to File a Reply in Support of Motion to Dismiss or to Stay Defendants, Amended Counterclaim" filed by the plaintiffs and counterclaim defendants is granted, and the brief entitled "Reply in Support of Motion to Dismiss or to Stay Defendants' Amended Counterclaim," received by the court on April 28, 1995, is deemed submitted instanter; and

(3) That filing no. 37, the Stipulation and Proposed Order by the parties has been rendered moot by this Memorandum and Order so that Magistrate Judge Thomas D. Thalken will enter an "Order Setting Schedule for Progression of Case" as appropriate.

DATED this 2nd day of June, 1995.

BY THE COURT:

/S/

THOMAS M. SHANAHAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNION PACIFIC CORPORATION, et al.,	)	
Plaintiffs,	)	
vs.	)	
BRYAN L. BECKHAM, et al.,	)	
Individually and on Behalf of All Class Members,	)	8:CV94-189
Defendants and Counterclaim Plaintiffs,	)	MEMORANDUM AND ORDER
vs.	)	
PENSION PLAN FOR SALARIED EMPLOYEES OF UNION PACIFIC CORPORATION, et al.,	)	
Counterclaim Defendants	)	

Before the court are: (1) filing no. 45, the "Plaintiffs And Counterclaim Defendants' Motion For Summary Judgment Based on the Statute of Limitations And Lack of Standing" filed by the plaintiffs and counterclaim defendants, Union Pacific Corporation and others; and (2) filing no. 65, the

"Motion Of Plaintiffs And Counterclaim Defendants For Leave To File A Reply In Further Support Of Their Motions For Summary Judgment" also filed by the plaintiffs and counterclaim defendants, Union Pacific Corporation and others.

After due consideration, and for good cause shown, the court finds and concludes that filing no. 65, the "Motion Of Plaintiffs And Counterclaim Defendants for Leave To File A Reply In Further Support Of Their Motions For Summary Judgment" filed by the plaintiffs and counterclaim defendants, Union Pacific Corporation and others, shall be granted. Accordingly, the court has considered the reply brief submitted by Union Pacific Corporation and others in reviewing the pending motion for summary judgment.

Additionally, after reviewing the pending motion, the court believes that oral argument is unnecessary in this matter. Accordingly, the counterclaim defendants', Union Pacific Corporation and others, motion for oral argument (filing no. 45, part 2) is denied.

BACKGROUND

On April 1, 1994, the plaintiffs, Union Pacific Corporation ("UPC"), Union Pacific Railroad Company ("UPRR"), Missouri Pacific Railroad Company ("MPRR") and the Missouri-Kansas-Texas System Pension Plan for Non-Agreement Employees ("MKT Plan") by Ursula Fairbairn, Barbara Schaefer and James Young ("MKT Plan Committee") filed their "Class Action Complaint for Declaratory Judgment" (filing no. 1) against the defendants and counterclaim plaintiffs, Bryan L. Beckham, Gary K. Bradshaw, William E. Dixon, Mike L. Eudy, Marshall W. Hales, Billy Joe Harmon, James M. Hentschel, Carl W. Holem, James D. Miller, Cecil Rhodes, Jr.,

Paul J. Richter and Daniel Witte. See filing nos. 32 and 35 (certifying class of more than 200 former employees of the MKT railroad as to Counts I, II, III, IV, V, and VI of the counterclaim). For purposes of this "Memorandum and Order" the court will refer to the class of defendants and counterclaim plaintiffs as "Beckham."

Beckham counterclaimed pursuant to 29 U.S.C. §§ 1132 (a)(l)(B) and 1132(a)(3), naming UPC, the MKT Plan, the MKT Plan Committee, the UP Plan and the UP Plan Administrator as counterclaim defendants. See filing no. 17, ¶¶ 1, 2. For purposes of this "Memorandum and Order" the court will refer to the counterclaim defendants collectively as Union Pacific Corporation ("UPC"). The gravamen of the counterclaim lies in Beckham's assertion that UPC's denial of "Credited Service" under the UP Plan for Beckham's prior service with MKT, and the further denial of "Credited Service" under the MKT Plan for Beckham's subsequent service with UPC, results in a substantial loss of retirement benefits to the class members and violates ERISA.

Specifically, Beckham raises seven claims in the "First Amended Answer And Counterclaim" (filing no. 17). Count I asserts that the MKT Plan and the MKT Plan Committee improperly refused to give Beckham "Credited Service" under the MKT Plan since Beckham became an employee of UPC on August 12, 1988. Count II asserts that the MKT Plan Committee and UPC breached their fiduciary duties by failing to give Beckham "Credited Service" under the MKT Plan since August 12, 1988. Count III asserts that the MKT Plan Committee violated 29 U.S.C. § 1054(h)(1) by failing to give Beckham "Credited Service" under the MKT Plan, thereby improperly freezing the rate of future benefit accruals under the MKT Plan. Count IV asserts that the MKT Plan, the MKT

Plan Committee and UPC violated 29 U.S.C. § 1054(g)(1) and (2) by eliminating or reducing a retirement-type subsidy, namely, Beckham's "Credited Service," through their refusal to allow Beckham to use "Credited Service" accrued with UPC after August 12, 1988 to satisfy the MKT Plan's early retirement benefit requirements. Count V asserts that the UP Plan and UP Plan Administrator improperly denied Beckham benefits by failing to give Beckham "Credited Service" under the UP Plan for all of Beckham's "Credited Service" under the MKT Plan after UPC acquired MKT on August 12, 1988. Additionally, Count V asserts that the UP Plan Administrator breached its fiduciary duty by failing to give this "Credited Service." Count VI requests that UPC be ordered to provide a voluntary early retirement incentive program ("VERIP") to Beckham due to UPC's failure to provide Beckham with "Credited Service" under the UP Plan based on prior "Credited Service" under the MKT Plan. Count VII, which was not certified as a class claim, involves UPC's alleged failure to comply with various ERISA disclosure requirements and is not a part of UPC's summary judgment motion.

Beckham and his class are participants in the MKT Plan by virtue of their former employment with MKT, and they became participants in the UP Plan after the merger of MKT into MPRR on August 12, 1988. Before the merger on August 12, 1988, a UPC representative prepared fact sheets for distribution to MKT employees affected by the merger. See filing no. 46, Bannister Aff't ¶¶ 2,3,6. Additionally, a UPC representative attended three open meetings where MKT employees were permitted to ask questions about the affect of the merger on their benefits. Id. In the "fact sheets" and during the meetings, UPC notified MKT employees that they would receive no "Credited Service" under the UP Plan for the period of their prior service with MKT and their participation in the

MKT Plan. Id. UPC also notified the MKT employees that after the merger they would not accrue further "Credited Service" under the MKT Plan, because their service for UPC would not count as "Credited Service" under the MKT Plan. Id. Members of the defendant class admit receiving such notice from UP prior to the August 12, 1988 merger. (Filing no. 60, Witte aff't ¶ 3).

ANALYSIS

Pursuant to Fed. R. Civ. P. 56(c), the court may grant summary judgment if there is no issue regarding any material fact in an action and the moving party is entitled to judgment as a matter of law. In considering a motion for summary judgment, the court views the facts in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that may be drawn from the evidence. Moore v. Webster, 932 F.2d 1229, 1230-31 (8th Cir. 1991).

In filing no. 45, UPC contends that Counts I to VI, inclusive, in Beckham's "First Amended Answer And Counterclaim" (filing no. 17) are time-barred by Neb. Rev. Stat. § 25-505 (five year limitations period for actions on contracts). UPC also contends that Beckham has neither a cause of action nor standing to sue for breach of fiduciary duty as alleged in Counts II and V.

A. Breach of Fiduciary Duty

In Counts II and V of the "First Amended Answer And Counterclaim" (filing no. 17), Beckham asserts that the MKT Plan Committee, UPC, the UP Plan and the UP Plan administrator breached their fiduciary duty by failing to

distribute benefits in accordance with the plan pursuant to 29 U.S.C. § 1132(a)(3). See Varity Corp. v Howe, 116 S. Ct. 1065, 1076 (1996). However, the Eighth Circuit Court of Appeals recently held that a plaintiff seeking individual relief under 29 U.S.C. § 1132(a)(3) on a breach of fiduciary duty theory does not have a cause of action when the alleged breach of fiduciary duty is a failure to distribute benefits in accordance with the plan. Wald v. Southwestern Bell Corp., 83 F.3d 1002, 1006 (8th Cir. 1996). Following the reasoning in Varity Corp., the court determined that the right to bring suit under § 1132(a)(1)(B) for a denial of benefits provides adequate relief and that additional equitable relief for breach of fiduciary duty in failing to distribute benefits in accordance with the plan would not be appropriate. Id. In effect, the court eliminated an individual's remedy under § 1132(a)(3) for a breach of fiduciary duty, when the breach is a failure to distribute benefits in accordance with the plan, so long as the individual has a cause of action for denial of benefits under § 1132(a)(1)(B). Id.

In this case, Beckham has a cause of action pursuant to 29 U.S.C. § 1132(a)(1)(B), and, therefore, has an adequate remedy for any loss of benefits caused by UPC's actions. Accordingly, Beckham does not have a cause of action pursuant to 29 U.S.C. § 1132(a)(3) for breach of fiduciary duty based on UPC's alleged failure to distribute benefits in accordance with the plans. Id. This is true even if Beckham's cause of action under § 1332(a)(1)(B) is time-barred, because it is the "right to bring a claim for benefits," not the act of bringing suit before the statute of limitations runs, that provides adequate relief. Id.

Consequently, the court finds and concludes that UP's "Motion For Summary Judgment" (filing no. 45) will be granted to the extent that Counts II and V of the "First Amended Answer And Counterclaim" (filing no. 17), that is,

those claims based on the counterclaim defendants' alleged breaches of their fiduciary duties, will be dismissed for failure to state a claim pursuant to Wald.

B. Statute of Limitations

In its "Motion For Summary Judgment" (filing no. 45), UPC also asserts that Counts I to VI, inclusive, in Beckham's "First Amended Answer And Counterclaim" (filing no. 17) are barred by the applicable statute of limitations. ERISA does not specifically contain a statute of limitations for Beckham's claims concerning UPC's allegedly improper denial of benefits or for the alleged violation of 29 U.S.C. § 1054 stated in Counts III and IV of the "First Amended Answer and Counterclaim" (filing no. 17). However, when ERISA does not specify a statute of limitations, courts apply an analogous statute of limitations under appropriate state law. See Adamson v. Armco Inc., 44 F.3d 650, 652 (8th Cir.), cert. denied, 116 S. Ct. 85 (1995); Schroeder v. Phillips Chem. Co., 970 F.2d 419, 420 (8th Cir. 1992) ("Schroeder II); cf. Eqerdahl v. Hibbing Community College, 72 F.3d 615 (8th Cir. 1995). In this instance, the analogous state statute of limitations is Nebraska's five-year statute of limitations for actions on written contracts (Neb. Rev. Stat. 25-205 (1995)). See Schroeder II, 970 F.2d at 420; see, also, Adamson, 44 F.3d at 652; Johnson v. State Mutual Life Assurance Co. of America, 942 F.2d 1260, 1263 (8th Cir. 1991). Additionally, Nebraska's five-year statute of limitations for actions on written contracts, Neb. Rev. Stat. 25-505, also applies to Counts III and IV of Beckham's "First Amended Answer And Counterclaim" (filing no. 17) and the alleged violations of 29 U.S.C. § 1054(g) and (h) because the contracts limitations statute is most closely analogous to Beckham's claims under 29 U.S.C. § 1054(g) and (h). Cf. Adamson, 44 F.3d at 652.

While the applicable statute of limitations is not disputed by the parties, the dates for the accrual of Beckham's claims are disputed. In the absence of a contrary directive from Congress, courts apply a discovery rule in cases involving a federal question to determine when a cause of action accrued. Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990), cert. denied, 111 S. Ct. 2916 (1991); see, also, Conners v. Hallmark & Sons Coal Co., 935 F.2d 336, 341 (D.C. Cir. 1991)(citations from eight circuits omitted); Alcorn v. Burlington Northern R.R. Co., 878 F.2d 1105, 1108 (8th Cir. 1989) (cause of action accrues "when a claimant knows, or should know through an exercise of reasonable diligence, of the acts constituting the alleged violation").

The general rule in an ERISA action is that a cause accrues when a "claim for benefits has been made and formally denied." Cotter v Eastern Conf. of Teamsters Retirement Plan, 898 F.2d 424, 428 (4th Cir. 1990) (citing Rodriguez v. MEBA Pension Trust, 872 F.2d 69, 72 (4th Cir. 1989)). However, in a situation such as the one presented by this case where exhaustion of administrative remedies is excused and, therefore, there was no formal denial of Beckham's claims before this litigation, determining the accrual date of the claim is much more difficult. See Cotter, 898 F.2d at 429; Schroeder v. Phillips Chemical Co., 4:CV90-00025, "Memorandum And Order On Defendant's Motion To Dismiss" (D. Neb. Dec. 10, 1991) (Schroeder I), rev'd on other grounds, Schroeder II, 970 F.2d 419 (8th Cir. 1992).

The facts in Schroeder I are very similar to those in the present action. The plaintiffs in Schroeder were former employees of Phillips Chemical Company. Id. On December 31, 1985 all employees of Phillips Chemical Company were transferred to American Fertilizer and Chemical Company. Id.

Subsequently, on February 28, 1986, Phillips sold its stock in American Fertilizer to Cepex, Incorporated. Id. Consequently, as of February 28, 1986 the plaintiffs were employed by Cepex, Incorporated, not Phillips. Id. The plaintiffs contended in their complaint that they were improperly denied severance benefits as a result of this transaction. Id.

American Fertilizer's plant manager informed the plaintiffs in early 1986 that they would not be entitled to severance benefits under Phillips' ERISA plan as a result of Cepex's purchase of American Fertilizer. Id. From the date of the sale to Cepex, Phillips maintained that the sale did not constitute a termination of the employees of American Fertilizer so as to require the payment of severance benefits. Id. Consequently, the district court excused the plaintiffs from exhausting their administrative remedies because it was clear that presenting their claims to Phillips would be futile. Id.

However, the district court then held that the plaintiffs action was barred by the statute of limitations because the plaintiffs' cause of action had accrued no later than the date of the sale of American Fertilizer to Cepex. Id. The court decided that the defendants "were aware no later than February 28, 1986, that they would not receive the benefits they now seek." Id. Consequently, the court ruled that "the very facts that justify excuse [namely, that the defendant had steadfastly refused to pay severance benefits from 1986] also triggered the running of the statute of limitations period such that the action is time-barred." Id. Although the Eighth Circuit Court of Appeals overruled the district court's choice of limitations period, the Circuit explicitly ruled that the district court was correct in determining that the "plaintiffs' cause of action accrued no later than February 28, 1986." Schroeder II, 970 F.2d at 420.

Similarly, this court excused Beckham from exhausting administrative remedies because, among other reasons, the exhaustion of remedies "would constitute a time-consuming, costly and futile endeavor." See filing no. 38 at pg. 5. The court reached this conclusion based in part on Beckham's argument that exhaustion would be futile because UPC "[s]ince 1986 . . . repeatedly advised [Beckham] that they would not receive credit under the MKT Plan for their service with the Union Pacific Railroad . . . [nor would Beckham receive] any benefit credit under the UP Plan for their MKT service." See Defendants and Counterclaim Plaintiffs' "Memorandum of Law In Opposition To Motion To Dismiss Or To Stay Defendants' Amended Counterclaim" at pgs. 15-16.

Nonetheless, just as in Schroeder I, the same facts which excused Beckham from exhausting plan remedies, namely, UPC had steadfastly refused since at least August 12, 1988 to provide benefits to Beckham, also subject several of Beckham's claims to dismissal for failure to comply with Nebraska's five-year statute of limitations on written contracts. It is clear from the "First Amended Answer and Counterclaim" (filing no. 17) that the claims alleged in Counts I, III, IV, and V are barred by Nebraska's five year statute of limitations because the claims asserted in those counts arose no later than August 12, 1988.

Specifically, Beckham's claims concerning the denial of "Credited Service," which are found in Counts I and V, clearly arose more than five years before the initiation of this lawsuit. As Beckham admits, there is no question that UPC has steadfastly refused to provide "Credited Service" from at least August 12, 1988. Filing no. 60, Witte aff't ¶ 3. Additionally, Count III, which alleges that the MKT Plan Committee improperly amended the MKT Plan by freezing future benefit

accruals under the plan, also arose no later than August 12, 1988 when the alleged amendment was implemented. Furthermore, Count IV, which alleges that the MKT Plan, the MKT Plan Committee, and UPC violated ERISA by cutting back future benefit accruals arose on the date the alleged "cut back" occurred, namely, August 12, 1988. Consequently, the court finds and concludes that Counts I, III, IV, and V of the "First Amended Answer and Counterclaim" (filing no. 17) will be dismissed as barred by the statute of limitations.

However, Count VI of the "First Amended Answer and Counterclaim" (filing no. 17) requests a declaratory judgment ordering UPC to offer Beckham a voluntary early retirement incentive program ("VERIP"). On its face, it appears that Count VI accrued in September, 1992 when UPC actually implemented a VERIP for which Beckham was not eligible, allegedly due to UPC's failure to provide "Credited Service" under the UP Plan for Beckham's "Credited Service" under the MKT Plan. See filing no. 17, ¶¶ 6972. Thus, on the record currently before the court, the court is unable to state that, as a matter of law, Count VI accrued more than five years before Beckham filed his counterclaim. Consequently, the court will deny UPC's "Motion For Summary Judgment" (filing no. 45) to the extent that the court will not dismiss Count VI as barred by the applicable statute of limitations.

Finally, because Beckham cannot assert a breach of fiduciary duty claim in this circumstance, as discussed above, this court will not consider the accrual of the statute of limitations expressed in ERISA which is applicable solely to breach of fiduciary duty claims. See 29 U.S.C. § 1113.

THEREFORE IT IS ORDERED:

(1) That filing no. 45, the "Plaintiffs And Counterclaim Defendants' Motion For Summary Judgment Based on the Statute of Limitations And Lack of Standing" filed by the plaintiffs and counterclaim defendants, Union Pacific Corporation and others is granted in part and denied in part;

(2) That filing no. 45, the "Plaintiffs And Counterclaim Defendants' Motion For Summary Judgment Based on the Statute of Limitations And Lack of Standing" filed by the plaintiffs and counterclaim defendants, Union Pacific Corporation and others is granted to the extent that Counts I, III, IV, and V of the "First Amended Answer and Counterclaim" (filing no. 17) filed by the defendants and counterclaim plaintiffs, Bryan Beckham and others, are dismissed as time-barred;

(3) That filing no. 45, the "Plaintiffs And Counterclaim Defendants' Motion For Summary Judgment Based on the Statute of Limitations And Lack of Standing" filed by the plaintiffs and counterclaim defendants, Union Pacific Corporation and others is granted to the extent that Counts II and V of the "First Amended Answer and Counterclaim" (filing no. 17) filed by the defendants and counterclaim plaintiffs, Bryan Beckham and others are dismissed for failure to state a claim;

(4) That filing no. 45, the "Plaintiffs And Counterclaim Defendants' Motion For Summary Judgment Based on the Statute of Limitations And Lack of Standing" filed by the plaintiffs and counterclaim defendants, Union Pacific Corporation and others is denied to the extent that the court will not dismiss Count VI of the "First Amended Answer and Counterclaim" (filing no. 17) filed by the defendants and counterclaim plaintiffs, Bryan Beckham and others;

(5) That the motion for oral argument (filing no. 45, part 2) filed by the plaintiffs and counterclaim defendants, Union Pacific Corporation and others, is denied;

(6) That filing no. 65, the "Motion Of Plaintiffs And Counterclaim Defendants For Leave To File A Reply In Further Support Of Their Motions For Summary Judgment" filed by the plaintiffs and counterclaim defendants, Union Pacific Corporation and others, is granted; and

(7) That pursuant to Fed. R. Civ. P. 54(b), this order is not a final and appealable order until there is an adjudication of all the claims, rights and liabilities of the parties to this action.

DATED this 26th day of September, 1996.

BY THE COURT:

/s/
THOMAS M. SHANAHAN
United States District Judge

FACT SHEET C (EMPLOYEE BENEFITS)
THE UNION PACIFIC RAILROAD (UPRR)
MISSOURI KANSAS TEXAS RAILROAD CO. (MKT)
MERGER
EMPLOYEE BENEFIT QUESTIONS & ANSWERS

QUESTION: 1. What will be the status of all Employee Benefit Programs effective the date of merger with Union Pacific Railroad?

ANSWER: Effective the date of the merger, all current MKT non-agreement Employee Benefit Programs will be replaced, and active non-agreement employees will be covered by the UPRR Employee Benefit Programs. Current retirees and all individuals retiring under the "MKT Pre-consolidation Voluntary Severance Program" will continue to receive their benefit coverage under the pre-consolidation MKT employee benefit programs.

QUESTION: 2. What is the status of retirees with regard to their medical, dental and life insurance coverage?

ANSWER: Retirees who were covered under the existing MKT medical, dental or life insurance plans will continue to be covered under those plans.

QUESTION: 3. If an MKT employee accepts "MKT Pre-consolidation Voluntary Severance Program" pension benefits at age 60, is the Group Insurance Plan continued for

non-agreement employees and their dependents with no cost to the employee?

ANSWER: Under current MKT policy, if you would elect to retire at age 60, you would be required to pay for your group dental, health and life insurance coverage until you reach age 61. Between the ages of 61 and 65, the MKT pays for your health and dental coverage, and you have the option of paying for life insurance coverage up to a maximum of your current salary. If you elect not to pay for life insurance, the MKT pays for $2,000 life insurance in your behalf for your lifetime.

As an enhancement to the "MKT Pre-consolidation Voluntary Severance Program," your group insurance coverage will be paid by Union Pacific for the period age 60 to age 61.

QUESTION: 4. Will Katy non-agreement employees who accept employment with Union Pacific be fully eligible to participate in the non-agreement Comprehensive Health Insurance Plan on the first day of employment? Are there any plan provisions to exclude pre-existing medical conditions.?

ANSWER: Yes, coverage is available the first day of employment. There is no clause in the UPRR Comprehensive Health contract to exclude pre-existing medical conditions.

QUESTION: 5. How will my MKT service time be applied in determining my eligibility for Union Pacific Railroad Employee Benefits?

ANSWER: Eligibility for Union Pacific Railroad's employee benefits programs will be based on the MKT service time plus foreign line railroad or other service time creditable under the MKT Pension Plan of each non-agreement MKT employee accepting employment with Union Pacific Railroad. Benefits include medical, dental and life insurance, short and long term disability, relocation, educations assistance, vacation and scholarship programs.

QUESTION: 6. How will individuals currently participating in COBRA continuation coverage be affected by the merger?

ANSWER: Under current COBRA regulations coverage of qualified individuals would be transferred to the Union Pacific Railroad. Premiums for this coverage would be at the same level as charged to other COBRA-protected participants for the Union Pacific Health Care Plan.

QUESTION: 7. What type of Company pension, life, health and dental insurance will be allowed for non-agreement employees who wish to accept the MKT Pre-consolidation Voluntary Severance Program and who have more than 30 years MKT total service, but are only 59 years of age:

ANSWER: MKT non-agreement employees, aged 58 and older, with 30 years creditable service, will be covered as outline above in the answer to Question No. 3.

QUESTION: 8. Will benefits (insurance, etc.) continue during the severance payment period?

ANSWER: The "MKT Pre-consolidation Voluntary Severance Program" describes the benefits provided.

QUESTION: 9. How will prior service time for the MKT be applied when calculating pension benefits?

ANSWER: Prior MKT service *will only* be used to determine an employee's vested benefit eligibility. Prior service *will not* be used to determine accrual under the UP Plan for pension benefits. For example, any MKT employee with creditable continuous service (the employee's service under the MKT plan may also include a number of years of foreign line or other service which counts as creditable service under the terms of the MKT Pension Plan) will have his/her MKT service combined with subsequent UP creditable service for vesting purposes. Currently the vesting provisions of both the MKT and Union Pacific Plans require ten (10) years of service for 100% vesting. Effective January 1, 1989, the vesting service requirement will be reduced to five years of service.

However, at retirement, the employee's pension first will be calculated on his/her MKT service and earnings (including foreign or other service time, if applicable) under the MKT pension formula, and then for the additional years of service and earnings with UP under the UP pension formula. (See examples below).

Examples:

1. Employee "A" has ten years creditable service with MKT, joins UP and works two years, then retires. Because Employee "A" had ten years of creditable service with MKT and was vested under its pension plan, Employee "A" is eligible for an MKT pension. In addition, since Employee "A" was vested in the MKT pension plan on the date of the merger, the employee becomes vested in UP's plan upon completion of 1000 hours of service with UP, and thus also is entitled to two years of benefit from UP. Employee "A" would receive a pension benefit calculated on ten years of service under the MKT pension program and two years under the UP pension plan.

2. Employee "B" has three years of creditable service with MKT, joins UP, works one year and then decides to retire. Because Employee "B" has only three years with MKT, Employee "B" is not vested in an MKT pension. In addition, because Employee "B" is not vested in the MKT plan at merger and has only one year with UP, the employee does not qualify for a UP pension. Since the combined service does

not equal or exceed ten years of service, there is not pension applicable to Employee "B."

3. Employee "C" has six years creditable service with MKT, joins UP and works four years before deciding to retire. Although Employee "C" is not vested in the MKT pension plan at the time of the merger, Employee "C" is, nevertheless, vested for a pension because the employee has ten years combined service with MKT and UP. Employee "C" will receive a pension benefit calculated on six years of service under the MKT pension plan and four years under the UP pension plan.

QUESTION: 10. In determining qualification for pension rights, what is meant by MKT creditable service? What is meant by UPRR creditable service?

ANSWER: MKT creditable service is outlined in Section 2.3 of the MKT Pension Plan. UPRR defines creditable service as the service used in calculating pension amount. Essentially, it is one full year for each year of service and partial years on a pro-rate basis.

QUESTION: 11. Under the present MKT pension plan, previous foreign line railroad service (other than MKT would be added to MKT service upon becoming vested. Would an employee lose the benefit of adding previous foreign line service if

that employee is not vested at the time of merger?

ANSWER: At date of merger all service (MKT, foreign line or other) will mature. This service will be credited for vesting purposes under the UP Pension Plan; however, for the accrual of pension benefits, it will be considered under the MKT Plan only. *UP service after the merger date will be used for the accrual of pension benefits only under the UP Plan.*

Example:
Employee "D" has six years creditable service with MKT and 10 years foreign line railroad service. Employee "D" joins the Union Pacific Railroad at merger and works four (4) years before deciding to retire. Under current MKT policy the 10 years of foreign line service is not recognized until Employee "D" has 10 years of creditable service with the MKT. However, at merger it has been agreed that all of Employee D's credited service time will mature (MKT and foreign line or other service). Therefore, when Employee "D" joins UPRR at merger, his/her 16 years service will be recognized for pension vesting and eligibility for Employee Benefits.

QUESTION: 12. The MKT does not count foreign line railroad service for vesting. Will foreign line service count under the Union Pacific Pension Plan at merger?

ANSWER: Yes, for the MKT merger only, foreign line railroad service or other credited service will

count for vesting under the Union Pacific Pension Plan. However, all MKT and foreign line or other service time will be calculated under the MKT Pension Plan at retirement.

QUESTION: 13. If an MKT employee accepts the MKT Pre-consolidation Voluntary Severance Program option to terminate and retire under the MKT pension plan, will the retirement compensation be reduced 1/180 for each month prior to age 65?

ANSWER: Yes. This is an acceptance that the severance offer is voluntary and is not considered as a "request by MKT to retire." However, the employee would have the option to defer receiving pension benefits until reaching age 65 so there would be no reduction in benefits.

QUESTION: 14. The current MKT Pension Plan does not allow retirement until age 60. Is there any consideration being given to changing this provision?

ANSWER: No.

QUESTION: 15. If an MKT employee accepts severance and retires, does his/her retirement under the "MKT Pre-consolidation Voluntary Severance Program" become effective immediately, or must he/she wait until the consolidation takes place?

ANSWER: Should you elect to accept the "MKT Pre-consolidation Voluntary Severance Program"

severance, the effective date is the date the consolidation takes place, not the date of approval by the ICC. Your retirement could be effective the date of consolidation, or you could defer your pension benefit.

QUESTION: 16. How many years of MKT service are required in order to be vested in MKT Pension Plan?

ANSWER: Ten years service with at least the 10th year as a plan participant.

QUESTION: 17. What is the vesting requirement under the MKT and Union Pacific Pension Plan?

ANSWER: Currently it is necessary for a participant to have 10 years of pension service under the Union Pacific Pension Plan. See answer to Question #16 for the MKT Plan. As indicated earlier, effective January 1, 1989, the requirement for active participants will be five years.

QUESTION: 18. At the time of the merger, if a non-agreement employee has 20 years service with MKT will he/she be vested in the MKT pension?

ANSWER: Yes, if he/she has 10 years service with at least the 10th year as a plan participant.

QUESTION: 19. If you retire prior to age 62, is Railroad Retirement taken out of your "MKT Pre-consolidation Voluntary Severance Program" severance pay? If so, does that extend your Railroad Retirement for the months money was collected so the penalty you receive in connection with Tier I portion is reduced

ANSWER: Railroad Retirement and all other payroll taxes would be taken out of the "MKT Pre-consolidation Voluntary Severance Program" severance pay, whether received on a lump-sum or monthly basis, but no extension for Railroad Retirement creditable months is granted.

QUESTION: 20. Can an eligible employee elect to draw Railroad Retirement benefits before age 65?

ANSWER: Yes. If an eligible employee has 30 or more years of Railroad Retirement credit, a full benefit is payable as early as age 62. However, the same employee could receive a reduced benefit (20% reduction in Tier 1) at age 60. If an eligible employee has more than 10 years but less than 30 of Railroad Retirement credits, a full benefit is not available until he/she attains age 65. However, this same employee could receive a reduced benefit (80%) as early as age 62.

QUESTION: 21. Will non-agreement MKT employees accepting UP employment be qualified to participate in the UP Thrift Plan?

ANSWER: MKT service plus foreign line service time will also be recognized with regard to determining an employee's *eligibility* to participate in the Union Pacific Thrift Plan. However, in determining an employee's eligibility for 100% vesting of Thrift Plan benefits upon death, retirement or long term disability, an employee will need to have ten or more years service or combined service with the MKT or UPRR. However, so become 100% vested in company contributions for regular withdrawals, an employee must have five (5) years participation in the Thrift Plan as a UP employee.

QUESTION: 22. Will vacation time be based on prior railroad service as was done under MKT plan, or will only MKT service time only be counted?

ANSWER: See answer to question #5.

QUESTION: 23. What is the UP policy regarding a) of employee as it pertains to the employee's house, b) is this policy the same for non-agreement and agreement personnel.

ANSWER: A) The UPRR has a liberal relocation policy which is provided to transfer non-agreement employees that cover

both real estate and movement of household expenses. A copy of this policy will be provided to each transferring employee.

B) This policy is not applicable to agreement personnel. Relocation assistance provided to agreement employees is subject to collective bargaining.

QUESTION: 24. What will be the status of MKT employees covered under the Long-Term Disability Benefits Program at merger?

ANSWER: MKT employees who are receiving long-term disability coverage prior to the merger will continue to receive that coverage after the merger. However, this coverage will terminate when they attain age 70, as prescribed by the current MKT program. Any active employee placed on LTD status on or after merger date will be covered by UPRR LTD Program.

The answers provided in this document are designed to provide the employee with a better understanding of his/her Employee Benefit Programs and may not apply to all MKT Railroad Company subsidiaries. However, in all instances, the official plan texts, trust agreements, and/or master contracts with insurance companies, as appropriate, are the governing documents.

UNION PACIFIC CORPORATION

Memorandum

To John P. Halan Date February 15, 1989

From John R. Parente Copy To

Subject MKT

In response to Carl von Bernuth's note to you, I believe that there are a number of things that still need to be done regarding MKT. As pointed out in Clarence Mason's memo dated February 4, 1988, our pension and thrift plans must be amended to provide that MKT service will count for vesting and eligibility purposes only and that benefit accruals will be prospective from August 12, 1988. Katy employees have been participating in the pension, thrift and welfare plans since August 12, 1988, but I am not sure that the necessary amendments were adopted.

No one seems to know the exact status of the old MKT Pension Plan other than that it has not been merged into the UPC Pension Plan. We must determine who the plan sponsor is, who is filing the 5500's, paying the PBGC premiums, preparing the actuarial work, etc. We have some actuarial reports in our file which indicate that the pension plan is significantly under funded. It is probably going to take a bit of time to sort things like this out and determine whether or not we have any ERISA problems. In the meantime, I recommend that if it hasn't been done already, we should obtain Union Pacific Board approval at the February meeting giving you the authority to do everything that is necessary to amend the Plans.

sa

Attachment

UNION PACIFIC CORPORATION

JOHN P. HALAN
Senior Vice President
Human Resources

February 22, 1989

PERSONAL AND CONFIDENTIAL

E. Virgil Conway, Co-Chairman
John B. Fery, Co-Chairman
Hamilton B. Mitchell, Co-Chairman
Robert P. Bauman
William D. Grant
Judith R. Hope
Lawrence M. Jones
Henry A. Kissinger
Morris F. Miller
Warren M. Shapleigh
Richard D. Simmons

Dear Committee Members:

As a result of the merger of the Missouri-Kansas- Texas Railroad Company (KATY Line) into the Union Pacific Railroad Company on August 12, 1988, it has become necessary to amend the Union Pacific Corporation pension and thrift plans to provide that KATY Line service will count for vesting and eligibility purposes only. Service with Union Pacific Railroad Company will count prospectively for benefit accrual and contribution purposes. It is also necessary at the Corporate level to take administrative actions to amend other Union Pacific Corporation employee benefit plans to include KATY Line employees and/or retirees and to amend or

terminate any employee benefit programs previously sponsored by the KATY Line.

We propose that the Committee recommend that the Board of Directors approve the appropriate plan amendments and authorize John P. Halan, Named Fiduciary - Plan Administration, or his delegated representative, to take any and all actions necessary to cover KATY Line employees and retirees under employee benefit programs sponsored by the Corporation.

Sincerely,

/s/

sa
cc: Drew Lewis

MARTIN TOWER, EIGHTH AND EATON AVENUES, BETHLEHEM, PA 215 861 3376

UPCorp. Board of Directors
February 23, 1989

REPORT OF COMPENSATION, BENEFITS AND NOMINATING COMMITTEE

Hamilton B. Mitchell, Co-Chairman of the Compensation, Benefits and Nominating Committee, reported that the Committee had considered a request that former employees and retirees of recently-acquired Missouri-Kansas-Texas Railroad Company be allowed to participate in the employee benefits programs of Union Pacific Corporation and that their service with M-K-T be counted, for vesting and eligibility purposes only, under the Union Pacific benefits programs, with subsequent service with Union Pacific Railroad Company or its affiliates to be counted for benefit accrual and contribution purposes. Mr. Mitchell advised that John P. Halan, in his capacity as Named Fiduciary-Plan Administration of the Union Pacific Pension, Thrift and other Plans, or as Senior Vice President-Human Resources of the Corporation, had accepted the participation of former M-K-T employees and retirees in the Union Pacific plans, but that such acceptance, credit for prior service with M-K-T and the amendment or termination as necessary of any employee benefit programs previously sponsored by M-K-T must be approved by the Committee and the Board of Directors. Mr. Mitchell stated that the Committee approved such participation, credit for prior service and amendment or termination of M-K-T plans and recommended approval by the Board.

UPCorp. Board of Directors
February 23, 1989

INCLUSION OF AND SERVICE CREDIT FOR FORMER EMPLOYEES OF MISSOURI-KANSAS-TEXAS RAILROAD COMPANY UNDER UNION PACIFIC CORPORATION BENEFITS PLANS

On recommendation of the Compensation, Benefits and Nominating Committee, and on motion duly made and seconded, it was unanimously

RESOLVED that this Board hereby ratifies the action of John P. Halan, Senior Vice President-Human Resources, in approving the inclusion of former employees and retirees of Missouri-Kansas-Texas Railroad Company under the Pension Plan for Salaried Employees of Union Pacific Corporation and Affiliates, as amended, the Supplemental Pension Plan for Officers and Managers of Union Pacific Corporation and Affiliates, as amended, the Union Pacific Corporation Thrift Plan, as amended, and other benefit plans of Union Pacific Corporation; and

FURTHER RESOLVED that John P. Halan, in his capacity as Named Fiduciary-Plan Administration for those plans for which he serves in such capacity and in his capacity as Senior Vice President-Human Resources in all other instances, or his delegated representatives, be and hereby is authorized to (1) amend the Pension Plan for Salaried employees of Union Pacific Corporation and Affiliates, as amended, the Supplemental Pension Plan for Officers and Managers of Union Pacific Corporation and Affiliates, as amended, and the Union Pacific Corporation Thrift Plan, as amended, to provide that service with Missouri-Kansas-Texas

Railroad Company counts for vesting and eligibility purposes only and to amend other benefit plans to also include Missouri-Kansas-Texas Railroad Company service for eligibility purposes only, with subsequent service with Union Pacific Railroad Company and its affiliates to be counted for benefit accrual and contribution purposes under all Plans, and (2) to amend or terminate as necessary any employee benefit programs previously sponsored by Missouri-Kansas-Texas Railroad Company.

Union Pacific Corporation

John R. Parente
Director
Benefits Planning and Administration

October 11, 1989

Mr. Scott Bannister
Director-Personnel Administration
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179

Dear Scott:

As I indicated in our telephone conversation, a number of issues regarding the MKT Pension Plan have come up as a result of our preparing the 1988 Form 5500's and at a meeting with people from our Financial Department and TPF&C. We have prepared a list of the questions and topics, and would appreciate your reviewing them, so that we can go over them in a telephone conference call, so that we have a better understanding of how the plan works, how it relates to the Union Pacific Plan, and what actions may be required by the Company under either the merger agreement or by our own design. Thanks for your assistance.

Sincerely,
/s/
John R. Parente

sa
Attachment
cc: H. A. Smith
D. J. Mithen

Martin Tower, Eighth and Eaton Avenues, Bethlehem, PA 18018 · 215 861 3369

KATY Questions

1. Send us a plan document, insurance contract, trust agreement, and IRS determination letter.

2. What was agreed to with regard to Plan sponsorship?

3. Status of vesting under the MKT Plan upon closing. Were benefits frozen?

4. Supply census as of 08/12/88 and accrued benefits list for actives, retirees, and terminated vested employees.

5. Is the rule of having 5 years of credit service at Union Pacific being applied to MKT people who retire(d) after the merger.

6. Who is paying the supplemental pension to the 19 retirees? Were they included in the annuity purchase? List names, amounts, form of benefit, spouse's name, and date of birth. Copy of plan document.

7. Were any KATY employees covered by the 5x5 Plan? If so, supply details.

8. Given the plan funding status at the time of acquisition, was there any agreement or understanding regarding future funding and/or merger of the MKT Plan with the Union Pacific Plan?

9. What does the monthly payment represent? How and by whom is it determined?

10. Dan Bratsveen has been paying $36,889 each month to the insurance company. Is this coming out of general assets and who gets charged for it? What does this cover and is it still accurate?

KATY Questions Response

The following responses apply respectively to each of the questions specified on the attached document:

1. Those documents in our possession are enclosed.

2. The answer to this question is unknown. The Law Department administered the merger negotiation.

3. Yes, benefits were frozen August 11, 1988.

4. Items requested are attached.

5. Yes, for the 5+5 only. It is not required in calculating regular pension amount, i.e., regular pension benefit is calculated for Union Pacific service after 1,000 hours if MKT/UP nonagreement service exceeds five (5) years.

6. The supplemental pension for the original 19 retirees is being paid by UPRR (see attached). They were not included in the annuity purchase as far as we know. Names and amounts are shown on the attached list; however, we do not show data on spouses since there is no surviving spouse benefit. This supplemental pension is a straight life benefit without a spousal benefit.

7. No KATY employees were covered by the 5+5 benefit because they did not have five (5) years of Union Pacific Railroad service.

8. The answer to the first half of this question is unknown - see Law Department. It is our understanding there would never be a merger of the two plans.

9. The $36,889 monthly payment is needed to keep pension payments from eroding Plan assets. This was determined by the Wyatt Company.

10. The charge for the $36,889 monthly payment is applied against MOPAC Operating Expense.

In view of the questions asked in the attached document, we have the following questions which we would like answered:

1. Should we continue to charge Operating Expense or charge the funded Pension Reserve?

2. Is the Wyatt Company still the actuary? If so, why aren't we getting updated material?

11/17a7

KATY Questions

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UNION PACIFIC RAILROAD COMPANY
CONSENT OF EXECUTIVE COMMITTEE

The undersigned, being all the members of the Executive Committee (the "Committee") of the Board of Directors of Union Pacific Railroad Company, a Utah corporation (the "Company"), acting without a meeting pursuant to Section 821 and 825 of the Utah Revised Business Corporation Act, do hereby adopt the following preamble and resolutions:

WHEREAS, on January 1, 1997 the Missouri Pacific Railroad Company ("MPRR") was merged into the Company; and

WHEREAS, the Missouri-Kansas-Texas Railroad Company ("MKT") was previously merged into MPRR; and

WHEREAS, MKT was the original plan sponsor of the Missouri-Kansas-Texas System Pension Plan for Non-Agreement Employees ("MKT Plan"); and

WHEREAS, the merger of MPRR into the Company makes the Company the sponsor of the MKT Plan; and

WHEREAS, the Company has determined that it is in the best interests of the Company to amend the MKT Plan

NOW, THEREFORE, BE IT RESOLVED that the MKT Plan is amended to provide as follows:

> Notwithstanding anything to the contrary otherwise provided in the Plan, the Normal Retirement Pension, Early Retirement Pension

and/or Deferred Vested Pension of any person employed by the Union Pacific Railroad Company or any other Employer on the date this Consent is fully executed shall not be increased by Hours of Service or Compensation on or after September 1, 1997. Further, no person who becomes employed by the Union Pacific Railroad Company or any other Employer after the date this Consent is fully executed shall accrue any Normal Retirement Pension, Early Retirement Pension and/or Deferred Vested Pension. No inference is to be drawn from the foregoing about the extent, if any, to which a Normal Retirement Pension, Early Retirement Pension and/or Deferred Vested Pension was earned for Hours of Service or Compensation received by any person employed by Union Pacific Railroad Company or any other Employer prior to September 1, 1997 or for a person who becomes employed after the date this Consent is fully executed, the date his/her employment begins.

FURTHER RESOLVED, that the officers of the Company be, and they hereby are, authorized and directed to take or cause to be taken all such further actions, to execute and deliver or cause to be executed and delivered all such instruments and documents in the name and on behalf of the Company, and to incur all such fees and expenses, as in their judgment shall be necessary or advisable in order to carry out fully the intent and purposes of the foregoing resolutions and each of them; and

FURTHER RESOLVED, that all actions heretofore taken by any officer of the Company in connection with the foregoing resolutions be, and they hereby are, approved, ratified and confirmed in all respects; and

FURTHER RESOLVED, that this Consent may be executed in separate counterparts, each of which when so executed and delivered shall constitute an original and all of which shall together constitute a single instrument.

IN WITNESS WHEREOF, each of the undersigned has executed this Consent on July 23, 1997.

/s/	/s/
Richard K. Davidson	L. White Matthews, III